THE HAWAIIAN CASE.

FROM the time when the United States first acquired territory outside its boundaries as they existed when the constitution was adopted, difficulties have been encountered in the interpretation of that instrument with reference to the applicability of its provisions within such acquired territory. These difficulties have been the occasion of much discussion and difference of opinion in Congress and of many expressions of view in the Supreme Court of the United States. Since the acquisition of possessions beyond the limits of the North American Continent, the judges of that court have so radically differed in their views that it has been impossible for a majority of them to agree on the reasoning to be accepted in determining cases involving this question, and the decision of each particular case has been arrived at by a concurrence of a majority as to the particular result reached, by different processes of reasoning, while in each instance the correctness of that result has been questioned by a minority, so that it cannot be said that the principles to be followed in subsequent cases are settled by the rule of *stare decisis*. It is not usually profitable to discuss differences of opinion in a court on a question foreclosed by the statement of the majority of the judges as to the point decided, but it is not improper as to this question to continue the discussion until a more harmonious enunciation of the considerations which will control the court in future cases has been secured; and the recent decision of the court in the Hawaiian case furnishes an apt occasion for such further discussion.

The Hawaiian case[1] involved, to state it succinctly, the question whether the provisions of the Fifth and Sixth Amendments to the Federal Constitution, so far as they guarantee to a person accused of an infamous crime the right to be tried only on an indictment by a grand jury and the verdict of a common-law jury, rendering a unanimous verdict, were applicable to a criminal proceeding under the laws of the territory of Hawaii as they existed between the time of the annexation of the islands to the United States, in 1898, and the time when by act of Congress of April 30,

[1] Territory of Hawaii *v.* Mankichi, 23 Sup. Ct. Rep. 787, decided in June, 1903.

1900, the constitution of the United States was formally extended to those islands and provision was made for the indictment and trial of those accused of crime in accordance with the ordinary common-law methods. To be more specific as to the exact question involved and with reference to which judgment was rendered by the Supreme Court, the controversy was as to whether the defendant, who had been put on trial for manslaughter in accordance with the existing laws in the Hawaiian Islands without indictment by grand jury, and had been convicted on a verdict of a jury concurred in by less than the whole number of jurors, was entitled to be discharged on writ of *habeas corpus*. It was not contended that defendant was deprived of his liberty without due process of law, for the procedure was on information charging him with the specific crime, and the trial was in a judicial tribunal, and, if the proceedings had been in a state court and in accordance with provisions of the state constitution authorizing such form of charge and method of trial, it could not have been contended that defendant had been deprived by the state of his liberty without due process of law in violation of the familiar provisions of the Fourteenth Amendment. The contention was that the method of accusation and trial was not authorized by law; and that therefore the defendant was not lawfully detained in prison under such conviction.

The territorial government of Hawaii was created in pursuance of a joint resolution of Congress, of July 7, 1898,[1] known as the Newlands Resolution, by which it was declared that the islands were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the condition that, "The municipal legislation of the Hawaiian Islands . . . not inconsistent with this joint resolution, nor contrary to the constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The procedure under which defendant was charged and convicted was in accordance with the municipal legislation of the islands and was properly authorized by the resolution, unless in this respect such legislation was contrary to the constitution of the United States. It was contrary to the constitution, if the Fifth and Sixth Amendments were applicable, otherwise it was not, and this was the single question to be determined. The decision of the United States District Court, on application for writ of

[1] 30 Stat. at L. 750.

habeas corpus, was that defendant was unlawfully held in custody, and this decision was reversed by the Supreme Court of the United States. The decision of the court was announced by Mr. Justice Brown, but Justices White and McKenna, who concurred in the conclusion reached, based their concurrence on grounds somewhat different from those stated in the opinion of Mr. Justice Brown, while the Chief Justice, speaking for a minority of four judges, dissented from the conclusion reached, and Mr. Justice Harlan, one of the minority, expressed his views at length in a separate opinion. It therefore appears that as to the reasoning on which a conclusion should have been reached, the opinion of Mr. Justice Brown represents fully the views of three of the judges; that of Mr. Justice White, the views of two; and that of the Chief Justice, the views of three. It is to be noticed as of much significance in its bearing on the views to be expressed in this article that the four Justices in the minority are the same as those dissenting in the Downes case,[1] and that the principles relied on in the dissenting views in the one case are substantially the same as those in the other. In the Downes case the question was whether an act of Congress, known as the Foraker Act, imposing duties on goods brought from the Island of Porto Rico into the ports of the United States, was in violation of the clauses of the constitution relating to commerce; and the discussion in the two cases runs on parallel lines, though, as will be noticed hereafter, there is ground for distinguishing the two cases and justifying diverse conclusions. The majority of the court in the De Lima case,[2] decided at the same time as the Downes case, which was composed of the judges who dissented in the Downes case with the addition of Mr. Justice Brown, who writes the majority opinion, held that on the ratification of the treaty with Spain Porto Rico ceased to be foreign country, and the Dingley Tariff duties could no longer be levied on goods brought into the United States from its ports; while the minority, consisting of the judges who united in the concurring opinion of Mr. Justice White in the Downes case, expressed the view that as the Dingley Tariff duties were applicable to goods imported from Porto Rico prior to the treaty with Spain, they continued applicable to such goods until Congress should change the law.

In a very brief way the important questions considered in these

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[1] Downes *v.* Bidwell (1901), 182 U. S. 244.

[2] De Lima *v.* Bidwell (1900), 182 U. S. 1.

three cases have been stated in order to show their relations. All the previous decisions of the Supreme Court of the United States, having any apparent bearing on the questions involved, are referred to and fully discussed *pro* and *con* in the opinions filed in these three cases, and the expressions of views of various jurists and public men are extensively cited. It would be a work of supererogation, therefore, to refer to the earlier authorities, nor would it be feasible within the reasonable limits of a magazine article to restate the arguments which are set forth as influencing the judgment of the various members of the court, and the answers made by other judges to these arguments. The object of this article is to classify these views as fully as practicable in order that the principles announced as distinct from the mere conclusions reached may be understood, and especially that it may be ascertained what light these announcements throw on the probable course of decision of the court in future analogous cases. This article is not written for the purpose of controverting the soundness of the position taken by any of the judges in these cases, though the writer will venture in the conclusion to suggest possible solutions of some of the difficulties which have not received the approval of any considerable number of the judges of the court. No one can read the opinions in these three cases without feeling that the questions involved are of very great difficulty, and that the views of the judges have been formulated only after exhaustive investigation and a careful consideration of their significance as affecting questions not involved.

The principles recognized by the various judges in these cases may be briefly and somewhat loosely stated as follows:

In the De Lima case the question was as to the effect of the annexation of territory to the United States by treaty, and the majority of the judges agree on the proposition that upon the ratification of a treaty of annexation the territory involved becomes territory of the United States, though, as appears in the other cases, the judges who constitute the majority in that case are divided as to the extent or effect of such annexation of territory, that is, as to whether it becomes for all purposes and in every sense a part of the territory of the United States and fully incorporated therein, or whether it still remains distinct as territory annexed but not incorporated, save as such incorporation may result from the express provisions of the treaty or subsequent action of Congress; while the minority take the un-

qualified position that the mere extension of the sovereignty of the United States over annexed territory does not in any sense incorporate it into the United States or change its relations to the United States as a municipal government, save as the power of that government is expressly extended over it.

In the Downes case the majority view is that the restrictions of the constitution on the power of Congress do not as a whole and of their own force apply to such acquired territory, the difference of opinion among the majority being as to whether some formal action, of either the treaty-making or legislative power, is necessary to make constitutional restrictions applicable to newly acquired territory, or whether, though the constitution is self-operating, as it were, the territory thus annexed remains outside of the territory to which the constitution applies until expressly incorporated. These views cannot be very accurately represented in a brief statement, but, as opposed to each other, they seem to be, on the one hand, that the constitution must be extended by treaty or legislation in order to give it effect in new territory, and, on the other hand, that while the constitution operates and takes effect regardless of treaty or legislation, it only thus operates and takes effect on territory which by treaty or legislation has been brought within the scope of its provisions. The minority view in this case is that no provisions of treaty or statute can add to the force and effect of the constitution; and that the mere extension of the sovereignty of the United States over territory brings that territory within the scope of all the provisions of the constitution regardless of any other consideration.

In the Hawaiian case the difference of view of the majority is substantially that already stated in the Downes case, and the position of the minority is the same as in that case; but the nature of the case leads to an emphasizing, by that division of the majority which entertains the view that the constitution does not extend itself by its own authority, of a possible distinction between some fundamental restrictions of the constitution which might perhaps be recognized with reference to any congressional action and other restrictions which apply only to particular classes of congressional power. The other division of the majority has no occasion to do more than reiterate their position in the Downes case and insist that the Newlands Resolution was not intended to bring the territory of Hawaii at once and by its own force within the scope of the provisions of the Federal Constitution, although the

territory had been by treaty annexed to the United States. The minority contents itself in the main with the argument that the Newlands Resolution did in fact extend the constitution over the territory of Hawaii, or, what is the same thing in effect, did bring that territory within the scope of the constitution; but Mr. Justice Harlan, while concurring in this argument, announces, to its full length and in its full breadth, the conclusion that by the mere annexation the provisions of the constitution applicable in other portions of the United States became applicable in the territory of Hawaii.

The conflicting views of the judges in these cases arrange themselves around three questions, or rather three points for consideration, these questions or points being in a way distinct, although by no means independent or unrelated, as follows: (1) acquisition of territory; (2) applicability of the constitution to different classes of territory; and (3) distinctions between different provisions of the constitution as to their applicability to classes of territory. The conflicting views may perhaps be profitably restated under these three divisions of subject matter.

(1) All the judges agree that the United States as a sovereign power may acquire sovereignty over new territory which will be complete and exclusive as to foreign nations. The majority of the court concludes that by this mere extension of sovereignty over new territory the internal relations of such territory to the other territory of the United States is changed, one division of the majority contending that such change is so radical as to fully identify the new territory with the other territory over which the United States is exercising sovereignty, while the other division of this majority contends that the extension of sovereignty over the territory, without more, puts it in the equivocal position of being no longer foreign territory on the one hand, nor, on the other hand, domestic territory. The minority, with reference to this question, contends that the new territory under such circumstances, although potentially, as it were, within the sovereign power of the United States so far as to exclude any other sovereignty, is not, to any extent, or for any purpose with reference to the constitution and laws of the United States, a part of the territory over which such constitution and laws extend of their own force.

(2) All the judges agree that Congress has power to legislate for the territory over which the sovereignty of the United States has been extended, such power existing in Congress by virtue of

the Federal Constitution, either as an implied power, or as one expressly delegated under the grant of power given to Congress in the Fourth Article "To dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." And all the judges agree further that in view of the nature of the government provided for by the constitution, unlimited power is not given to Congress with reference to such newly acquired territory. It is the view of the majority, however, that the limitations on the power of Congress in this respect are either unwritten or consist of restrictions found in that instrument as to some fundamental matters, and do not include all the limitations of the constitution, while the minority think that Congress in exercising its power with reference to newly acquired territory is subject to all the restrictions found in the Federal Constitution relating to the exercise by Congress of its powers.

(3) All the judges recognize a distinction between the powers which Congress may exercise with reference to territory within state limits, and that which it may exercise as to territory outside of state limits; but they differ as to whether all the limitations of the constitution applicable to the powers of Congress to legislate with reference to territory outside state limits belonging to the United States at the time of the adoption of the constitution are applicable to legislation with reference to territory subsequently acquired. They might have held that all the limitations on the power of Congress, found in the Federal Constitution and its amendments, were applicable only to the exercise of its power within territory included within state lines, and that as to territory outside of state lines its power is sovereign and unlimited, and some of them incline to this view; but the majority of them admit that there are some limitations upon the power of Congress in its action with reference to territory outside of state lines.[1] If there are such limitations, they must be written among, or implied from, the provisions of the constitution itself, for the whole theory of our constitutional system excludes the possibility of any court arrogating to itself the power to say that Congress has overstepped mere general and indefinite limitations in such sense that its acts are invalid; for no judicial tribunal which derives its authority from the constitution

[1] The contention in Downes *v.* Bidwell that all the cases recognizing the applicability of the limitations of the constitution outside of state limits are explainable on the theory that the constitution has been extended by treaty or act of Congress is denied by the minority and not acceded to by one division of the majority.

can exercise authority beyond that which by the constitution is expressly or impliedly given to it.[1] Therefore limitations on the power of Congress to legislate with reference to the territories must be found in the constitution, and conceding that not all the express limitations in the constitution are applicable to Congress thus legislating, the fact that some of the judges insist on a distinction between territory which was under the sovereignty of the United States but not within state limits at the time the constitution was adopted, and territory subsequently acquired, makes it necessary, for a convenient discussion of the application of particular limitations to particular classes of territory, to make a classification of territory subject to the jurisdiction of the United States; that is, assuming that the limitations on the power of Congress found in the constitution are applicable whenever and wherever Congress attempts to exercise the power on which such limitations are imposed, it is necessary to consider the territorial application of the various limitations found in the constitution. For this purpose the following classification may be made: (*a*) territory included within state limits and subject to the jurisdiction of the states respectively; (*b*) territory within state limits as to which, by consent of the states concerned, exclusive jurisdiction has been conferred on the United States in pursuance of the provisions of the paragraph[2] relating to the District of Columbia and places purchased by the United States for the erection of forts, dockyards, and needful buildings; (*c*) territory which at the time of the adoption of the constitution was not within the limits of any state, but was within the territorial limits of the sovereignty of the United States, including the Northwest Territory and other territory which, claimed by the respective states, had been already ceded or was afterwards ceded by such states to the United States; (*d*) territory subsequently acquired by the United States by treaty. Subsequently acquired territory, as described in division (*d*), might be subdivided in various ways, but any distinctions as to the applicability of constitutional provisions to different portions of such territory depend evidently on provisions of treaties or statutes with reference thereto and are immaterial for present purposes. Now it is evident that as the primary purpose in the adoption of the Federal Constitution was to provide for a common government of the states, all the constitutional limi-

[1] The writer begs to refer on this subject to his article on "Unwritten Constitutions in the United States," 15 HARV. L. REV. 531.

[2] Art. 1, Sec. 8, Par. 17.

tations are applicable to legislation so far as it relates to territory within state limits. As to territory ceded by the states to the United States for a seat of government and for forts, dockyards, and public buildings, not all the limitations are applicable; for Congress has, as to such places, an exclusive power to legislate which it does not have with reference to territory within state limits. Nevertheless, as these places have been within state limits, no doubt all the general limitations on the power of Congress were intended to apply here. No reason is discoverable in the constitution for supposing that territory within the description of division (*c*) should stand on a different footing than that in division (*d*), and if it was contemplated that the provisions of the constitution extended to territory of the one class it must also have been contemplated that they extended to territory of the other, unless we should say that acquisition of new territory was not contemplated; but if not contemplated it was not authorized, and the general agreement on the proposition that new territory may be brought within the sovereignty of the United States would seem to preclude further argument. It would have been much easier to reach a satisfactory conclusion if the judges could have agreed that the question was whether the limitations of the constitution are applicable to legislation with reference to territory not included within state lines.

If it be permitted to suggest a line of decision which would not have involved the complicated distinctions made or attempted in the cases under discussion, and to consider the results which the court following such line of decision would have reached in these cases, it is briefly submitted that without serious difficulty or disastrous consequences it might have been held that all territory over which the sovereignty of the United States is extended becomes incorporated into and a part of the territory of the United States; that the power of Congress to legislate with reference to such territory is given by the constitution and subject to the limitations of the constitution; and that these limitations are divisible into two classes, those of the one class being applicable to legislation relating to territory within state limits, the other to legislation of any character regardless of territorial limits. Under such a line of decision the De Lima case could have been decided just as it was decided; for the distinction which the majority in that case attempts to make between annexed territory and domestic territory is made solely with a view to the conclusion to be reached in the Downes

case. It is further submitted that the Downes case might have been decided just as it was decided, for the question was whether the Foraker Act imposing duties for the benefit of the territorial government of Porto Rico upon goods brought from that island into the states was in violation of any limitations on congressional power; and it might reasonably have been said that the provisions of the constitution as to uniformity [1] were applicable only with reference to commerce among the states or between the ports of any state and foreign countries. Without amplifying this suggestion, it is sufficient to refer to Professor Langdell's article in the January number, 1899, of this magazine,[2] in which the possibility of such construction is considered. As will be hereafter indicated, the present writer does not agree with Professor Langdell's conclusion that there are no limitations on the power of Congress with reference to legislation over territory outside of state lines, but his reasoning would seem to sufficiently sustain the view that as the limitations in sections eight and nine of Article One were evidently intended to prevent discriminations among the states they should be limited to that purpose. With this purpose in view, it would seem perfectly justifiable to hold that the requirement of uniformity is limited to such duties, imposts, and excises as Congress may impose for the support of the federal government regarded as a government of the states; and that the prohibition of preferences to the ports of one state over those of another should be limited in the same way. That these provisions were adopted with reference to the states of the Union is indicated by the restrictions of section ten of the same article upon the powers of states as to duties on imports and exports and duties of tonnage. Under this view there would be no objection to the imposition by Congress of duties upon goods brought from any territory of the United States outside of state limits into the ports of any of the states for the purpose of raising revenue for the support of the territorial governments, for such duties would be levied by Congress, not under the general power to levy duties, imposts, and excises, but under the power to legislate for territory of the United States outside of state limits. It is difficult to conceive any reasonable objection which could be made to the holding that the doctrine of uniformity as to imposts, duties, and excises, like the rule of apportionment

[1] Sec. 8, Par. 1 and Sec. 9, Par. 6, of Art. 1. Clearly Par. 5 of Sec. 9 would have no application.

[2] 12 HARV. L. REV. 365.

of capitation and other direct taxes, should be limited to the power of Congress to raise revenue for general purposes.

The application of the line of decision above suggested to the question in the Hawaiian case, that is, the effect of the Fifth and Sixth Amendments on proceedings in territorial courts, would perhaps be more difficult, and yet a satisfactory solution might easily be reached. The contention on the one hand would be that as the only judiciary directly contemplated by the constitution is the federal judiciary, exercising its power within territory included in state limits, these amendments have no application to territorial courts which are not created or authorized in pursuance of the judiciary article, but are provided for or authorized by Congress under the authority to legislate for the government of the territories. On the other hand, it could be contended that these amendments forming part of the Bill of Rights were incorporated into the constitution as a result of the fear that too great a measure of power was being given to the federal government,[1] and the conviction that Congress should be limited as state legislatures had already been limited in state constitutions for the protection of individual rights, and were intended to apply to the exercise of any power vested in Congress by the constitution, including the power to make rules and regulations for territory not within state limits. The latter of these views seems to the writer of this paper to be more in consonance with the principles of our constitutional government. If it is admitted that the framers of the constitution contemplated the exercise by Congress of the power of providing territorial governments, it can hardly be conceived that they intended to give to Congress unlimited power in this respect. It must be borne in mind that the protection of individual rights and property against the undue exercise of governmental power was an ever-present motive in the framing of the state and federal constitutions; and that the rights thus protected were not conceived of as the rights of any particular persons but of all persons. It is hardly imaginable that the framers of the constitution, having in mind the principles of the Declaration of Independence, would have deliberately contemplated the subjection of any class of people who should come within the jurisdiction of the United States to an arbitrary and unlimited power which they did not tolerate for themselves. An argument against this conclusion is

[1] See 6 HARV. L. REV. 405.

that predicated on the assumption that the ordinary methods of procedure in common-law courts cannot be applied in courts proceeding in accordance with the principles of another system of jurisprudence; but it is a significant fact that the courts of Louisiana, in which the civil law system still prevails, have been able to administer justice, both civil and criminal, without the violation of any of the fundamental principles of the common law. True it is that some changes in methods of procedure were necessary after Louisiana became a part of the Union, but these changes were easily made there, and might easily be made in any jurisdiction where justice is being administered in accordance with the forms of law. It is not necessary that the final and complete sovereignty of the United States be extended to any territory in which a system of civil and criminal law cannot be put in operation for the government of all persons who by the acquisition of such territory become subjects of the United States. Looking at the Newlands Resolution from this point of view, it would not be difficult to reach the conclusion that it was intended that criminal procedure in the territory of Hawaii should be administered after the treaty for the annexation of the islands went into effect in accordance with the requirements of the Fifth and Sixth Amendments. It may be that jury trial in Hawaii or in the Philippines would be to some extent unsatisfactory, but it is likewise unsatisfactory under some conditions found to exist in other portions of the territory of the United States, and mere inconvenience is not a sound argument as against the application of either a constitutional or statutory requirement. The most serious objection to regarding the constitutional requirements of indictment and jury trial to be applicable in the territories is that the states may dispense with these requirements so long as they do not take away due process of law, while Congress cannot, under the view here suggested, dispense with them in the territories. But the assumption that these restrictions bear harder upon Congress than upon the states is superficial. Such requirements have been found in the constitutions of all the states, and they have been modified only by amendment of those constitutions. The restrictions of the federal constitution, construed as limiting the power of Congress to provide for territorial governments, may likewise be removed by amendment. There is no essential dissimilarity between the two classes of cases.

The court in the cases above referred to has not indicated any definite conclusion on the interesting question as to the status of

the inhabitants of the territory recently acquired by the United States, but, from the views expressed by the various judges, it may well be surmised that when the question arises there will be radical differences of opinion. It may, indeed, be contended that there may be within such territory subjects of the United States, individuals whose personal and property rights are permanently controlled by laws made by or under the authority of Congress, who are not and cannot become citizens; and that persons born within territory which has been accepted as within the jurisdiction of the United States under the broad definition of the Fourteenth Amendment are not citizens by birth. That amendment recognizes the possibility of permanent existence within the territory of the United States of Indian tribes the members of which are not citizens of the United States nor subject to its laws; and without doubt there are tribes of people in the Philippine Islands which may be put in the same category with similar effect. But it will not be easy to form a rational conception of the situation of persons who owe allegiance to the laws of the United States, and of territorial governments established under the authority of the United States, who are not, by virtue of that fact, citizens of the United States. Such a conception would, it is submitted, be inconsistent with the rules of international law so far as they affect the rights and privileges of those persons going for a proper and temporary purpose from the limits of the United States into foreign countries, and, it is also submitted, it would be contrary to the principles of our constitutional system of government; and yet, if Professor Langdell's exposition is sound to its fullest extent, such a conception, with all the complications following it, must be entertained. Indeed the fundamental objection to the theory is that it must lead to the conclusion that persons born in any part of the territory of the United States, outside of state limits, are not *ipso facto* citizens of the United States under the provisions of the Fourteenth Amendment. Such has not been the practical construction placed upon that amendment. It will certainly be difficult to establish a theory of the constitution under which children born of white parents permanently residing in Porto Rico or the Hawaiian or Philippine Islands are not American citizens, and it will be equally difficult to point out any recognized distinction between children born of white parents and those whose parents are Negroes, Malays, or Indians, provided at the time of the child's birth such parents are subject to the laws of the United States with the intention of con-

tinuing subject to those laws. No such distinctions as to color have been recognized with reference to citizenship by birth, though they have been perpetuated as to citizenship by naturalization. Bearing in mind the important fact that rights of citizenship do not include political rights, which are not regarded as inherent but as conferred in accordance with the dictates of public policy, there seems to be no particular reason for denying the rights of citizenship to any class of persons who are subject to the laws. The line of decision which has been suggested would settle the question of citizenship without any necessity for instituting fine distinctions.

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